

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
GERALD ANDREW DARBY, )  
 )  
Defendant. )

CRIMINAL CASE NO.  
2:16cr00036

TRANSCRIPT OF PROCEEDINGS  
(Motion to Suppress)

Norfolk, Virginia

May 10, 2016

BEFORE: THE HONORABLE ROBERT G. DOUMAR,  
United States District Judge

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE  
By: Elizabeth M. Yusi  
Leslie Fisher  
Assistant United States Attorneys  
Counsel for the United States

FEDERAL PUBLIC DEFENDER'S OFFICE  
By: Rodolfo Cejas, II  
Assistant Federal Public Defender  
Counsel for the Defendant

1 (The hearing commenced at 10:59 a.m.)

2 THE CLERK: United States of America v. Gerald  
3 Andrew Darby, Case 2:16cr36.

4 Are the parties ready to proceed?

5 MS. YUSI: Good morning, Your Honor. Beth Yusi, and  
6 with me I have Leslie Fisher, from the Department of Justice.

7 THE COURT: Who is going to argue the case,  
8 Ms. Yusi?

9 MS. YUSI: I will be dealing with the first motion  
10 to suppress, and Leslie Fisher will be dealing with the  
11 second motion to suppress.

12 THE COURT: Okay. All right.

13 Mr. Cejas, where is all your help? Well, I see  
14 you've got some help back there in the back of the courtroom.  
15 I think they came here to observe. They're not going to help  
16 you?

17 MR. CEJAS: I reserve the right to call Mr. Colgan.

18 THE COURT: This is on your motion, Mr. Cejas.  
19 Let's get started. Go ahead.

20 MR. CEJAS: Thank you, Your Honor.

21 Your Honor, just as an introductory matter, we don't  
22 have any witnesses, but I believe the United States may have  
23 at least one.

24 We filed the first motion to suppress raising  
25 essentially three issues; one, that the NIT warrant here that

1 was issued by the Judge in the -- the Magistrate Judge in the  
2 Eastern District of Virginia out of Alexandria, that, one, it  
3 lacked probable cause; two, that the FBI intentionally misled  
4 the issuing court; and that, three --

5 THE COURT: Stop. Was what?

6 MR. CEJAS: I'm sorry, Your Honor?

7 THE COURT: One is you were talking about probable  
8 cause.

9 MR. CEJAS: Yes, sir.

10 THE COURT: Two?

11 MR. CEJAS: Two is -- and I just -- and, of course,  
12 I'll refer to the brief that we submitted, but, in any event,  
13 that the FBI intentionally or recklessly misled the issuing  
14 court in how the cite appeared at the time the warrant was  
15 issued. Of course, the information, which I believe is  
16 uncontested, is that the FBI had seized control of the site  
17 prior to --

18 THE COURT: You're talking about the changes.

19 MR. CEJAS: Yes, sir -- well, I'm talking about the  
20 site was seized, I believe, on February 19th, 2015. It had  
21 an appearance at that particular time, which was not  
22 indicated in the government's request for the NIT warrant,  
23 and we believe that that, of course, is inappropriate.

24 The third issue, of course, is that it was an  
25 anticipatory warrant and that there was no triggering event

1 at the time that the warrant was issued; therefore, there was  
2 no probable cause at the time the warrant was issued.

3 Of course, I think --

4 THE COURT: Well, let's deal with just this issue  
5 now, and we'll deal with the second -- we'll deal with these  
6 three points at this time --

7 MR. CEJAS: Yes, sir.

8 THE COURT: -- and then we'll argue the other  
9 question about whether the warrant itself is void -- how is  
10 that, okay? -- later.

11 MR. CEJAS: That's fine, Judge.

12 THE COURT: Okay. Go ahead. I'll be glad to hear  
13 from you.

14 MR. CEJAS: All right. Your Honor, obviously, we  
15 wrote a detailed position in our brief that I submitted to  
16 the Court addressing each of these issues in detail. We  
17 believe that, first, it was not supported by probable cause.  
18 I believe the government does have some exhibits in reference  
19 to the Playpen Web site, but the Playpen Web site had both  
20 questionably -- had a mix of legal and illegal content,  
21 arguably; chat rooms, message forums, and so forth. That, in  
22 and of itself, did not provide sufficient probable cause for  
23 the issuance of the warrant. There was not enough  
24 information with that alone to suggest that there was some  
25 illegal activity involved.

1           And I think it's important, even as a background  
2     to -- and I know, again, we both addressed it in our  
3     briefs -- how this NIT warrant -- how it operated. The TOR  
4     network was designed to provide -- yes, sir.

5           THE COURT: Yes, but the question that we're dealing  
6     with now is probable cause for how the Internet operates, so  
7     we'll deal with that. And I will deal with it, Mr. Cejas,  
8     just strictly -- that's the main issue that you're making in  
9     this particular portion of the motion to suppress.

10          MR. CEJAS: Well, again, Your Honor, we believe it  
11     wasn't supported by probable cause. It wasn't any  
12     particularized information about the site, about the site  
13     visitors. It didn't include an expert collective profile.  
14     The information was simply lacking in the application itself.  
15     The pictures at the time that the -- the pictures posted on  
16     the Playpen site at the time the warrant was issued, there's  
17     no suggestion that they contained -- that they were not  
18     lascivious images. I would note, as we cited in our brief,  
19     the fact that there was nudity in and of itself does not  
20     indicate that there was child pornography or anything that  
21     this warrant sought to authorize.

22          So we believe that under those circumstances --  
23     again, I don't want to reiterate everything that we  
24     submitted -- the probable cause was lacking. It was simply  
25     not sufficient information to authorize the issuance of that

1 warrant.

2 THE COURT: So you contend that the affidavit  
3 submitted was not sufficient. Isn't that correct?

4 MR. CEJAS: Yes, sir.

5 THE COURT: All right. Is there anything in  
6 particular in this affidavit that you think is lacking?

7 MR. CEJAS: Well, yes, sir, Your Honor. I believe  
8 there are a variety of things in the -- let me just go -- I'm  
9 just going through my submission. There's no particularized  
10 information about the site visitors. There wasn't any  
11 particular -- it didn't contain an expert --

12 THE COURT: What do you think jail bait is? You  
13 don't like jail bait? Jail bait? You know, what is jail  
14 bait? Tell me just what you think jail bait is. Do you  
15 think there's an understanding of what jail bait is? Boy, or  
16 jail bait girl?

17 MR. CEJAS: I don't have any particular  
18 understanding one way or the other, Your Honor, not since  
19 high school, anyway.

20 THE COURT: You think boys are jail bait and --

21 MR. CEJAS: I'm sorry, Your Honor, I missed the  
22 Court's question.

23 THE COURT: You know, jail bait videos, girls,  
24 boys -- you know, Mr. Cejas, what is your position on that?  
25 How about preteen videos or preteen photos or -- you know,

1     how about all of that?   Would you say that's not probable  
2     cause?

3             MR. CEJAS:   Well, Your Honor, what I suggest is that  
4     at the --

5             THE COURT:   How about fetish, you know, bondage,  
6     chubby, feet, panties, nylon, spandex, pee, scat, spanking,  
7     vintage, voyeur, zoo -- what do you think that's all about?

8             MR. CEJAS:   Well --

9             THE COURT:   That's just good, honest conduct of any  
10    good child porn place, right?

11            MR. CEJAS:   No, not necessarily, Your Honor.   I  
12    think fetish is not necessarily limited to child pornography.  
13    Some of the other things that the Court cited are not  
14    necessarily limited to child pornography.   There are  
15    suggestions in reference to --

16            THE COURT:   What do you think preteen photos are?  
17    Do you think that this guy is advertising that he's a  
18    portrait photographer?   Is that what he's doing?   And if you  
19    do, Mr. Cejas -- it's possible.   It could be.   He could be a  
20    portrait photographer.   You know, he just wanted to show how  
21    preteen -- and how about "preteen videos with girls"?

22            MR. CEJAS:   Well, Your Honor, I think if we look to  
23    the name of the Web site itself, there's nothing in there  
24    that's necessarily associated --

25            THE COURT:   How about "preteen videos girls HC"?

1 Does it mean hard core? That's what it says here.

2 "Based on my training and experience, I know that  
3 the following abbreviations respectively mean: HC, hard  
4 core." What do you think is -- you know, Mr. Cejas, without  
5 stopping Ms. Yusi, I don't have much problem with probable  
6 cause, very frankly. I don't want to cause anybody not to  
7 have an opportunity to speak and call forth, you know, but  
8 I'm just looking at the application. That's all.

9 MR. CEJAS: I understand, Your Honor.

10 THE COURT: I don't have any problem with that.

11 But I'll hear from Ms. Yusi, in case she wants to  
12 say something. She better, because you never know. The  
13 Court of Appeals might say I didn't give you enough time.

14 MS. YUSI: Thank you, Your Honor.

15 I mean, we do -- as we attached the affidavit, I  
16 don't think we need to put it as an exhibit; it's the purpose  
17 of the motion to suppress. But if the Court would like, we  
18 do have Special Agent Alfin, who was involved with the case,  
19 who can reiterate everything he said in the affidavit.

20 THE COURT: Well, you don't have to. You really  
21 don't, Ms. Yusi.

22 MS. YUSI: Okay.

23 THE COURT: You know, I don't waste time, and all of  
24 this has been very well briefed by both sides, so there's no  
25 question that I understand it. And one can pick out any part



1 or portion of things, but there's no question that there's  
2 probable cause here, there just isn't, unless somebody says,  
3 I don't know anything about or never heard of child  
4 pornography. Maybe if I never heard of it and came from Mars  
5 and landed on the earth I might have a different view. But,  
6 unfortunately, I think this is, without question, a child  
7 pornography production place. I don't think there's any  
8 question about it.

9 MS. YUSI: Your Honor, I really have nothing to add,  
10 then.

11 THE COURT: So I'm not trying to stop you, Ms. Yusi,  
12 I'm just saying it's fully briefed. There's no question  
13 about that.

14 So let's get to the meat in the coconut in this  
15 case. And it's a really important part, and I'll get to that  
16 with Mr. Cejas.

17 MS. YUSI: Thank you.

18 THE COURT: And that is the question of the Federal  
19 Rules of Criminal Procedure, okay?

20 Let's go, Mr. Cejas.

21 MR. CEJAS: Well, Your Honor, let me just say in  
22 reference to the previous point that the things that the  
23 Court cited, of course, are accessed after you actually get  
24 into the site, not on the home page itself. All of those  
25 things that Your Honor cited were not on the home page

1       itself, and so I think that is of some importance.

2               Again, the --

3               THE COURT: I don't doubt, Mr. Cejas, that it's of  
4       some importance, the fact it's there. It's there. And, you  
5       know, I'm going to assume that a person doesn't know anything  
6       about the computer? I'm not going to do that. The question  
7       is that in today's world the computer has become second  
8       nature. Imagine. The computer is so strong as a subject of  
9       children's education that they don't teach handwriting  
10      anymore. Imagine. So if the computer is that important,  
11      that a person doesn't have to handwrite anymore -- they use  
12      the computer. You know, I'm just not going to get into it.

13              Mr. Cejas, I appreciate the fact that you wrote an  
14      excellent memorandum, and I read it, and I've read the  
15      material, and I just -- there's no question in my mind about  
16      probable cause.

17              MR. CEJAS: All right.

18              THE COURT: So once we get over that, let's get to  
19      the real meat in the coconut in this case, and that is, I  
20      think, a very important question --

21              MR. CEJAS: Well, Your Honor --

22              THE COURT: -- did the Magistrate Judge have the  
23      authority to issue this warrant. And that's what is really  
24      the question.

25              MR. CEJAS: Well, Your Honor, of course, our

1 position is that the Magistrate did not have the authority to  
2 issue the warrant, and the warrant was, in fact, void when it  
3 was issued. It cannot be supported by the Magistrates Act,  
4 nor can it be supported by Rule 41(b).

5 This warrant had no geographical limitation. It's,  
6 in essence, a warrant to search and seize anything or any  
7 particular computer anywhere. There are no jurisdictional  
8 limits, and I believe that the Magistrate Act limits the  
9 jurisdiction of the Magistrate to issue a warrant. It has to  
10 be limited to the district where the Magistrate is sitting.  
11 There's certainly no authority whatsoever to issue, in this  
12 case, a nationwide search.

13 In its response the government makes much of the  
14 fact that the computer in this case, Mr. Darby's computer,  
15 was actually located within the Eastern District of Virginia.  
16 I would suggest that that's not relevant -- I'm sorry?

17 THE COURT: Don't you think that's important? It's  
18 no prejudice to Darby, is it?

19 MR. CEJAS: Well, of course it is, Your Honor. If  
20 the warrant had been issued for the Eastern District of  
21 Virginia, then I wouldn't have, necessarily, an argument to  
22 suggest that a Magistrate would not have that authority.

23 But it wasn't issued for the Eastern District of  
24 Virginia, it was issued for essentially anywhere. And this  
25 warrant has been used in at least, that we know of, maybe 18

1 jurisdictions.

2 THE COURT: Why does Darby have the authority or the  
3 standing, in essence, to complain about that which did not  
4 prejudice him?

5 MR. CEJAS: Well, Your Honor, it certainly did  
6 prejudice him. The warrant that was issued again in this  
7 Court in January of this year was based, in large measure,  
8 upon this warrant that was issued on February 20th of last  
9 year. Obviously, but for that warrant, Mr. Darby wouldn't be  
10 sitting here.

11 So I think there's no question he was prejudiced.  
12 There's no question, for that matter, that he has standing.  
13 Because it was that warrant that they used to identify his  
14 address, his IP address, and the other information that the  
15 Malware, that the NIT, the technique, depending on which word  
16 the Court wants to use -- but for that warrant, they would  
17 not have been able to identify Mr. Darby's computer to get  
18 the IP address or any other information, the subscriber  
19 information, anything else. So certainly he has standing to  
20 raise this issue.

21 THE COURT: Well, obviously, you say that 41(b) does  
22 not mean what it says. Why did they change it? Why did they  
23 change Rule 41? What were the changes?

24 MR. CEJAS: Your Honor, I don't believe Rule 41 has  
25 been changed as of this particular time. This -- I know that

1 there is an amendment pending, but it has not been changed.

2 THE COURT: That's what I'm talking about. There's  
3 an amendment now to Rule 41(b) -- 41. The new proposed  
4 rule -- I don't know if it's in effect or not -- is enough to  
5 recognize that it needed to be changed. Why did it need to  
6 be changed?

7 MR. CEJAS: I don't think I'm following you, Your  
8 Honor.

9 THE COURT: Well, now they plan on doing this:

10 "Venue for warrant application at the request of a  
11 federal law enforcement officer or an attorney for the  
12 government, a Magistrate Judge with authority in any district  
13 where activities related to a crime may have occurred has  
14 authority to issue a warrant to use remote access to search  
15 electronic storage media and to seize or copy electronically  
16 stored information located within or outside the district if  
17 the district where the media or information is located has  
18 been concealed through technological means..."

19 No need to go on, but what do you say about that?

20 MR. CEJAS: Well, I believe the amendment is based  
21 on the fact that as it existed when this warrant was issued  
22 demonstrates that the Magistrate simply did not have the  
23 authority, or that this warrant was not sufficient, or that  
24 Rule 41 did not permit --

25 THE COURT: I made a mistake. April 28, 2016. So

1 is this -- it says...

2 (There was a pause in the proceedings.)

3 THE COURT: "The amendment shall take effect on  
4 December 1st, 2016." You're quite correct.

5 But it is a proposed amendment -- it's not proposed,  
6 it is an amendment that will take effect in December of 2016,  
7 correct?

8 MR. CEJAS: I assume, without any additional act  
9 from Congress, yes. But it's much like the amendments that  
10 are proposed in the sentencing guidelines, and it is my  
11 experience that this Court does not necessarily abide by  
12 amendments -- proposed amendments in the guidelines. There  
13 are a variety of amendments that are proposed by the  
14 Sentencing Commission that have been passed, I believe, in  
15 April of this year. They will not become law or become in  
16 effect until November 1st, so I don't believe that the Court  
17 is obligated to --

18 THE COURT: Well, do you think it was necessary to  
19 change Rule 41?

20 MR. CEJAS: Well, I believe so, because it  
21 recognized that the Magistrate did not have the authority  
22 under the current version of Rule 41.

23 THE COURT: Okay.

24 MR. CEJAS: Which I think is consistent with our  
25 argument.

1 THE COURT: Absolutely.

2 MR. CEJAS: And, so, because the Magistrate doesn't  
3 have the authority at this time, this amendment has not  
4 been -- is not law, and so the Court -- I think the amendment  
5 shows that the Magistrate did not have the authority to issue  
6 it, and, therefore, it is, in fact, void as of now, as of the  
7 point -- more importantly, when it was issued in February,  
8 2015.

9 THE COURT: Whether the rule actually voids a  
10 warrant where it does not give the authority to the  
11 Magistrate Judge to issue the warrant. Isn't that your  
12 position?

13 MR. CEJAS: Yes, sir.

14 THE COURT: And that, succinctly stated, is that  
15 since the Magistrate Judge does not have the authority to  
16 issue the warrant -- the wording is "to search for and seize  
17 a person or property located within the district."

18 This warrant authorizes the search of anyone  
19 anywhere, correct?

20 MR. CEJAS: That is -- yes, Your Honor, "wherever  
21 located."

22 THE COURT: And, therefore, since that's the case,  
23 it violates the terminology utilized in Rule 41. But your  
24 client is in the State of Virginia, right?

25 MR. CEJAS: Yes, Your Honor.

1           THE COURT: And the only search conducted was within  
2 the state, correct?

3           MR. CEJAS: (Shrugs.)

4           THE COURT: So you're saying maybe the warrant is  
5 void, but the guy is guilty. Isn't that about what they say?  
6 He's guilty, so why not figure out a way to send him to jail?

7           MR. CEJAS: Well, I think it would be, perhaps,  
8 issuing a warrant to stop every car that comes down Route 13,  
9 because we know historically on Route 13 drugs are  
10 transported either from New York or Philadelphia to Virginia.  
11 We pretty much know that.

12           THE COURT: That's a pretty good idea, I think. It  
13 would certainly slow down the drug trade.

14           MR. CEJAS: Perhaps, but it would certainly be  
15 unconstitutional.

16           THE COURT: If they closed the bridge-tunnel every  
17 once in a while it slows down the drugs. And, you know, the  
18 local people can raise the prices then, you know?

19           MR. CEJAS: Well, maybe so, Judge. But, again, the  
20 point is that it would be unconstitutional, and the fact that  
21 they get lucky every once in a while --

22           THE COURT: Let me ask you this:

23           Does the Magistrate Judge have the authority to  
24 issue the warrant? If the Magistrate Judge does not have the  
25 authority to issue the warrant, is the warrant valid because



1 the Magistrate Judge could have issued a warrant against this  
2 particular person? Isn't that where we really are?

3 MR. CEJAS: Sort of, Judge. I don't believe the  
4 fact that the Magistrate could have is relevant, because  
5 we're not talking about what they could have done, we're  
6 talking about what they did. They issued a warrant for any  
7 computer, wherever located. And so when the government --

8 THE COURT: They certainly did that, and there's no  
9 question about that. The question then comes down to is  
10 there -- should the warrant be void ab initio; that is, if  
11 it's void ab initio then the defendant could have the search  
12 annulled --

13 MR. CEJAS: Yes, sir.

14 THE COURT: -- and the evidence flowing from that  
15 search. I think it's a really important question.

16 Let me hear from the Department of Justice, who is  
17 going to argue this point. I think this is really important.

18 We have a case in Massachusetts, and we have a case  
19 in Washington.

20 MS. FISHER: Good morning, Your Honor.

21 THE COURT: Were you involved in either of those  
22 cases?

23 MS. FISHER: In the Massachusetts case? No, Your  
24 Honor.

25 THE COURT: Huh?

1 MS. FISHER: In the Massachusetts case? No, Your  
2 Honor, I wasn't.

3 THE COURT: In the Washington case you were?

4 MS. FISHER: I'm not sure if our office was involved  
5 in the briefing for that case, Your Honor.

6 THE COURT: Oh, okay.

7 MS. FISHER: Your Honor, in this scenario that we  
8 have here, which is a Magistrate Judge in the Eastern  
9 District of Virginia who issued a warrant for a NIT to be  
10 deployed in the Eastern District of Virginia, on a server  
11 located in the Eastern District of Virginia, which led law  
12 enforcement to find a defendant located in the Eastern  
13 District of Virginia, the government's position is there's no  
14 need to even go beyond that analysis.

15 There's no doubt that a Magistrate in the Eastern  
16 District of Virginia has authority as to this defendant, as  
17 applies to Mr. Darby, and if we're talking about --

18 THE COURT: Was any warrant issued against  
19 Mr. Darby?

20 MS. FISHER: Would have authority to issue a warrant  
21 against Mr. Darby.

22 THE COURT: Was there a warrant issued against  
23 Mr. Darby?

24 MS. FISHER: No, Your Honor, but as is applied here  
25 in this case we're talking about Mr. Darby, and if we looked

1 at it the way the defense seems to want it to be, which is  
2 that this Magistrate could only issue any warrant that would  
3 only have effect within the Eastern District of Virginia --  
4 which the government does not concede that that's the case,  
5 but even if we looked at it that narrowly, the way the  
6 defense is stating it should be read, this warrant would  
7 still apply to Mr. Darby, even if it was limited to the way  
8 the defendant suggests, within the Eastern District of  
9 Virginia. To only have effect within the Eastern District of  
10 Virginia, it still would have found Mr. Darby, and it still  
11 would apply to Mr. Darby.

12 THE COURT: Is there anything in the warrant that  
13 says it only had effect in the Eastern District of Virginia?

14 MS. FISHER: No, Your Honor, but it does thoroughly  
15 explain that the NIT and the server are located within the  
16 Eastern District of Virginia, and so the Magistrate with the  
17 closest ties to the NIT and to the server is the one who  
18 issued the warrant.

19 THE COURT: Suppose the person was using an Internet  
20 on the Key Bridge. Could they have taken that?

21 MS. FISHER: Was using the Internet where, Your  
22 Honor?

23 THE COURT: On the Key Bridge.

24 MS. FISHER: On the Key Bridge between D.C. and  
25 Virginia?

1 THE COURT: Yes.

2 MS. FISHER: Yes, I think it would still apply to  
3 them, Your Honor. In this case, as we laid out in the  
4 response to defendant's second motion to suppress, even  
5 if --

6 THE COURT: It always interests me. The Key Bridge  
7 interests me because, you know, I've said you could smoke  
8 marijuana on the Key Bridge, but if you come back to Virginia  
9 you can't. According to the Justice Department, that is.

10 MS. FISHER: I didn't know that, Your Honor.

11 THE COURT: You didn't?

12 MS. FISHER: I didn't know that you could smoke  
13 marijuana on part of the Key Bridge and not on another part.

14 THE COURT: Well...

15 MS. FISHER: But, Your Honor, I think, as we've laid  
16 out in our brief, this warrant, as it was issued and as it  
17 was applied, doesn't violate either Rule 41, as it is  
18 currently written -- we don't even -- the defense makes a big  
19 point in their motion to talk about this proposed amendment.

20 THE COURT: It's not proposed.

21 MS. FISHER: It's more than proposed, Your Honor.  
22 It has been approved by the Supreme Court.

23 THE COURT: Let's don't play games. It's  
24 interesting to note the amendment tells me that they felt it  
25 was necessary to change the rule.

1 MS. FISHER: They felt it -- I'm sorry, Your Honor.

2 THE COURT: And if they changed the rule to make  
3 it -- there's no question that a Magistrate Judge in December  
4 of 2016 can issue such a warrant. The question is today can  
5 a Magistrate Judge issue such a warrant. If the Magistrate  
6 Judge issues the warrant, then you're saying even though the  
7 Magistrate Judge does not have authority to issue the  
8 warrant, it doesn't make any difference. Isn't that where we  
9 really are?

10 MS. FISHER: No, Your Honor. Our argument is that  
11 this Magistrate did have authority to issue the warrant, not  
12 that it doesn't matter whether she had it or not, but that  
13 she did have it.

14 THE COURT: Oh, she did?

15 MS. FISHER: Yes, Your Honor, that's the argument as  
16 laid out in the --

17 THE COURT: Read me 41(b) that says that.

18 MS. FISHER: Your Honor, talking about this  
19 amendment that's going to go into effect in December, if you  
20 look at what actually the defense attached to their motion,  
21 the proposed amendment and then the memorandum sort of  
22 addressing --

23 THE COURT: Did the warrant allow to search and  
24 seize a person or property other than within the District of  
25 Virginia?

1 MS. FISHER: Your Honor, the way that it works with  
2 the Internet is that any defendant that was found through  
3 this warrant reached into the Eastern District of Virginia  
4 electronically to get what they wanted off of the server,  
5 which was child pornography in this case. And, so, if you --  
6 as laid out in the brief, I think sort of the more analogous  
7 parts of Rule 41(b) to this particular issue are, I would  
8 say, Rule 41(b) (2) and Rule 41(b) (4).

9 Rule 41(b) (2) allows a Magistrate to issue a warrant  
10 for property outside the district if it's located in the  
11 district at the time the warrant is issued but may be moved  
12 outside. And that's what happened here. The child  
13 pornography was located on the server located in the Eastern  
14 District of Virginia. The defendants who were found through  
15 this warrant reached into the District of Virginia to get the  
16 child porn and electronically took it back to their district.  
17 So that's an analogous part of 41(b), as is Rule 41(b) (4),  
18 which allows for a tracking device.

19 This is, in essence, an electronic tracing device,  
20 and Rule 41(b), as it's written right now, allows for that.  
21 And that's why in the briefing that the Department of Justice  
22 provided with regard to this amendment it was made clear that  
23 this does not expand Rule 41(b), it merely clarifies Rule  
24 41(b) for this brave new world we're in with technology.

25 THE COURT: I always like clarifications, especially

1 when they spell it out. They're just clarifying. I wish the  
2 advisory committee to the rules, the civil rules, would say  
3 that. That would be interesting. They're always clarifying  
4 rules, aren't they?

5 So you don't really have to change the rules.

6 MS. FISHER: Your Honor, I don't know that the  
7 change is necessary, and I think that's laid out in the  
8 Department of Justice's briefing. It's just to make it  
9 abundantly clear that Rule 41(b) allows for this type of  
10 search and to avoid situations like this in the future, where  
11 we're arguing about whether it does or doesn't. It will be  
12 very clear.

13 But the government's position is that Rule 41(b), as  
14 it is written right now, allows for this search warrant.

15 THE COURT: So the government's position or the  
16 Department of Justice's position is that Rule 41 allows a  
17 District Judge to conduct such a warrant or to provide such a  
18 warrant as long as the locale to which things are being  
19 generated comes into Virginia at some time or other. Isn't  
20 that correct? Isn't that your position?

21 MS. FISHER: Well, I am saying that that's what  
22 happened in this case. In this case the NIT, the server,  
23 were located in the Eastern District of Virginia. Even  
24 ignoring the fact that Mr. Darby himself was located in the  
25 Eastern District of Virginia, even if he was located across

1 the country, he had to reach into the Eastern District of  
2 Virginia electronically to get that data.

3 THE COURT: So once the person sends in the  
4 request -- okay? -- then you're saying they can't go out and  
5 search his computer in Ohio, correct?

6 MS. FISHER: No, that's not what I'm saying. I  
7 think this warrant is valid --

8 THE COURT: Under what authority can they search his  
9 computer in Ohio?

10 MS. FISHER: Well, they would have to get a second  
11 search warrant, as was done here, for the particular  
12 residence, which was done here, which has been done in all  
13 the cases that have generated from this NIT. A local  
14 Magistrate Judge was then gone to with probable cause to get  
15 a search warrant for that home. In this case it just so  
16 happens that Mr. Darby's home was also in the Eastern  
17 District of Virginia.

18 And, so, in all of these cases there have been two  
19 warrants. There's the NIT warrant, and then for the home  
20 there's been a second warrant gotten from the district in  
21 which the person's computer is. And that's what happened  
22 here; a second search warrant was gotten for his home. So --

23 THE COURT: So the obtaining of the information for  
24 which the second warrant is based was not illegal, correct?

25 MS. FISHER: No, Your Honor. I believe the Eastern



1 District of Virginia Magistrate who issued the warrant for  
2 the NIT had the authority to do so, as applied to Mr. Darby,  
3 and as applied to anyone that accessed that Web site, and  
4 then, therefore, the information that was gotten was taken to  
5 a Magistrate here, and we got a search warrant for  
6 Mr. Darby's home.

7 So I don't think it's illegal at any stage or  
8 outside of the bounds of Rule 41 at any stage in this case.

9 THE COURT: There really isn't any necessity to  
10 amend 41, then.

11 MS. FISHER: Your Honor, I'm not -- I think that's  
12 above my pay grade whether we should amend Rule 41.

13 THE COURT: I should clarify all the rules? I'd  
14 like to clarify a bunch of rules, if I could. I think it's a  
15 great idea. I don't want to change them, just clarify them.  
16 Isn't that what we do? So we'll see.

17 MS. FISHER: Yes, Your Honor.

18 THE COURT: But your position is there's no question  
19 that as long as the warrant is issued, no matter how broad it  
20 is, it's permissible under Rule 41.

21 MS. FISHER: I wouldn't say no matter how broad a  
22 warrant is, but the warrant in this case -- we've already  
23 discussed there was probable cause for the NIT warrant. Your  
24 Honor has already addressed that.

25 THE COURT: I'm not worried about the probable case.

1 MS. FISHER: The judge --

2 THE COURT: There's no question that this particular  
3 place was designed to provide child pornography. There isn't  
4 any question in my mind about that, and I don't like to argue  
5 about useless things. And I hate to put Ms. Yusi off,  
6 because she's pretty good, but that's neither here nor there.  
7 The question really is there was probable cause to issue a  
8 warrant. The question wholly is did the Magistrate Judge  
9 have the right to issue the particular warrant it issued.

10 MS. FISHER: Yes, Your Honor.

11 THE COURT: And you're saying if the warrant, as  
12 served, could have been and would have been in this  
13 case limited to Virginia -- but it wasn't so limited in  
14 words, but it was in use limited to Virginia, because it  
15 wasn't applied outside of the state, correct?

16 MS. FISHER: Your Honor, that argument that I  
17 started with was just to say that this could be a very simple  
18 issue for this Court to decide in this particular situation,  
19 because Mr. Darby is in the Eastern District of Virginia, and  
20 so we don't really need to look beyond that in this argument.  
21 But if we do, the government's position is --

22 THE COURT: Now that I'm not worried about that  
23 right off the bat, let's go to the other part.

24 MS. FISHER: Right, Your Honor. And the  
25 government's position then is that this warrant, as it's

1 applied, as it's written, even as applied to defendants  
2 outside of the Eastern District of Virginia, is still within  
3 the bounds of Rule 41 and still within the bounds of the  
4 Fourth Amendment, and it is a legal warrant.

5 THE COURT: So 41 as it presently exists allows a  
6 Magistrate Judge to issue a warrant that would encompass  
7 individuals residing in other states, as long as they are  
8 sending material to this state, correct?

9 MS. FISHER: Yes, Your Honor, that's how it happened  
10 in this case; is that the judge with the closest ties to the  
11 server and the deployment of the NIT was the Magistrate Judge  
12 who approved this warrant. So the server and the NIT were  
13 located within the district, the geographic district, over  
14 which she has authority. It has effects outside of that  
15 district, but Rule 41(b) anticipates that that's going to  
16 happen with warrants issued by magistrates. But even with  
17 property that's located in the district at the time the  
18 warrant is issued, as it was in this case, that after that it  
19 might go outside of the district, like a tracking device, or  
20 like property that someone physically moves from one place to  
21 another.

22 THE COURT: It's an interesting point. Let me hear  
23 what Mr. Cejas has to say about that. I think it's very  
24 interesting.

25 All right, Mr. Cejas. The government contends that

1 the Magistrate Judge had the authority under 41 to issue the  
2 warrant.

3 MR. CEJAS: Well, Your Honor, our position is that  
4 the Magistrate did not have the authority to issue the  
5 warrant under Rule 41.

6 In the case that we cited, *United States v. Levin* --  
7 and there was an amended memorandum and order issued last  
8 week on May 5th -- the Court addressed that exact issue.  
9 This warrant was issued not -- it wasn't limited to the  
10 Eastern District of Virginia, nor was there any language in  
11 the warrant limiting it to anywhere. In fact, that was the  
12 language, "anywhere" or "wherever found."

13 The Magistrate does not have the authority as Rule  
14 41 existed at the time this warrant was issued, to issue that  
15 sort of warrant. It could not have been issued as Rule 41  
16 exists at this particular time. If anything, the amendment  
17 shows that there was an issue. I guess you could use the --  
18 if you follow the government's argument, it would almost  
19 be -- I guess, to use a phrase, if it's not broke, don't fix  
20 it. If it's not broke, there's no need to fix it. Well,  
21 obviously there's some problems. That's why the basis for  
22 the amendment, because the Magistrate could not do what it  
23 did in this case.

24 And, to answer the Court's question, the government  
25 has sought to use this warrant in searches in a variety of

1 jurisdictions; in Massachusetts, which was the *Levin* case, in  
2 Washington State, in Wisconsin. And in at least, I believe,  
3 18 different jurisdictions they've used this particular  
4 warrant to justify searches.

5 And, as is cited in *Levin*, what is authorized by  
6 this warrant is not necessarily -- it's a search not for the  
7 server, obviously, but where the computer is. And in this  
8 case it's wherever, "wherever found," and the Court simply  
9 did not have the authority to issue that sort of warrant.

10 Rule 41 does not give them --

11 THE COURT: -- find out where the computer is, is it  
12 local, correct?

13 MR. CEJAS: I apologize.

14 THE COURT: We're searching a local place to  
15 determine where the computer is.

16 MR. CEJAS: Well, the warrant authorizes the search  
17 of the computer, wherever that computer is. And that is the  
18 problem; is that the Magistrate did not have the authority to  
19 issue that warrant.

20 If Rule 41 had been followed, the warrant simply  
21 could not have been issued as it was drafted.

22 THE COURT: Anything else?

23 MR. CEJAS: No, sir, Your Honor. I would ask the  
24 Court, as we cited in our brief, I think this is -- Judge  
25 Young in *United States v. Levin*, particularly in the opinion

1 written on April 20th, and again in the amended order of  
2 May 5th, addressed each of these issues and sided, I believe,  
3 in our favor, so we would ask the Court -- no, I don't have  
4 anything else to add, Judge.

5 THE COURT: Thank you, Mr. Cejas.

6 Anything either of you desire to add?

7 MS. FISHER: No, Your Honor.

8 THE COURT: Anything else?

9 It's an interesting matter, and I find it very  
10 difficult, and I'm going to look at it again in consideration  
11 of the government's position that the warrant was issuable  
12 under Rule 41.

13 Otherwise, I have some problem with it. If the  
14 warrant is void, then it's void. But we'll see where we're  
15 going. It's whether the Magistrate Judge could or could not  
16 have issued the warrant, and that's, to me, the real problem  
17 in the case.

18 Some say, well, there's no prejudice that this  
19 gentleman, Mr. Darby, would have in this case, because he's  
20 from Virginia, in Virginia, no search was conducted outside  
21 of Virginia, the material that came in to the server was from  
22 Virginia. So we'll see. You'll hear from me probably  
23 about -- I hope by the end of the week.

24 All right, unless you want to tell me anything else.  
25 If not...

1 I'm sorry I didn't have your FBI agent testify, but  
2 I didn't see any reason for having the FBI agent testify. I  
3 just -- probable cause is in this case. There's not any  
4 question about that, in my mind. So I don't go through  
5 useless things unless I have to, okay?

6 (The hearing adjourned at 11:44 a.m.)  
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CERTIFICATION

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

/s

Heidi L. Jeffreys

February 21, 2017

Date

Heidi L. Jeffreys, Official Court Reporter